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Issue Date: 13 August 2003

CASE NOS: 2001-LHC-00277 / 01696

OWCP NO: 18-73155

In the Matter of:

JESSE LOPEZ,
Claimant,

v.

MAERSK PACIFIC, LTD.,
Employer,

and

COMMERCIAL INSURANCE SERVICES,
Carrier.

Appearances:

Diane L. Middleton, Esquire,
For the Claimant,

James P. Aleccia, Esquire,
For the Employer/Carrier

Before: DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This matter arises under the Longshore Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). Claimant Jesse Lopez ("Claimant") seeks compensation and medical benefits for injuries sustained in the course and scope of his employment as a longshoreman with Maersk Pacific, Limited ("Employer"). Claimant's Exhibits 1 through 10, and Employer's Exhibits 1 through 12, and 14 through 20 were admitted into evidence at the formal

hearing held May 6, 2003 in Long Beach, California.[1] Tr 10-11. The record was left open for fifteen days following the hearing to allow for the receipt of two post-trial depositions, one of which was submitted.[2] Tr 123-24.

I. Facts

Claimant, born May 17, 1963 in Mexico, moved to the United States in 1968 and completed a twelfth grade education through an EH ("Educational Handicap") Program. Tr 27-28. Claimant has a learning disability, identified in fourth grade, and is unable to read or write but can recognize numbers. Tr 28, 32. In 1994 Claimant began working as a longshoreman as a "casual," then as an apprentice longshoreman or "B-registry" and in April 1999 finally earned his Class A status. Tr 30.

While employed with Maersk, Claimant worked various jobs as a swingman, lasher, holdman and gearman, and performed duties including latching, utility tractor rig ("UTR") driving, preparing cranes with chains, removing bars off incoming cargo containers, and unloading cargo from the hull of ships. Tr 34-39. Claimant testified some of these duties required heavy lifting, mostly of chains, bars, and other equipment or cargo. Tr 37-38.

On April 11, 2000, Claimant worked as a swingman, responsible for unlocking containers from a chassis to ready the containers for pick up by a crane. Tr 39-41. While at the rear of an URL, Claimant unlocked the corner pin of a chassis and as he proceeded to the other corner pin, the driver backed up, striking Claimant with the container and chassis. Tr 42-43. Claimant remembered "something like hitting my back, I heard my helmet go, and I just saw a lot of stars." Tr 45. While possibly unconscious, paramedics transported Claimant to the Long Beach Memorial hospital emergency room. Tr 45-46, 84-84.

At the emergency room, Claimant was assessed with "a blunt injury to the back with a possible spinal cord injury." Cx 1 at 2. A lateral x-ray of his cervical spine was negative to C4, and his chest x-ray was also normal. Cx 1 at 6, 8. Claimant also underwent a CT ("computer tomography") scan of his head, abdomen and pelvis, as well as his cervical spine and thoracic spine, all of which were negative for any acute injuries. Cx 1 at 9-13. Claimant's x-rays of his lumbar spine and left shoulder were also normal. Cx 1 at 7, 17. Claimant underwent a neurosurgical trauma consultation with Dr. Barry Ceverha, and was assessed with "left hemi-hypesthesia and weakness." Cx 1 at 18. Dr. Ceverha also noted that while a spinal cord injury

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[1]References to the hearing transcript are indicated by "Tr;" Claimant and Employer's exhibits submitted at the hearing are indicated by "Cx" and "Ex," respectively. Employer's Exhibit 15 consists of two surveillance tapes, taken on July 7-8, 2000 and June 16, 2001.

[2]Employer/Carrier submitted only the deposition of Dr. James T. London, although the parties indicated at the hearing that the deposition of another physician would also be forthcoming.

might be possible, the sensory and motor findings on the same side would be "an unusual presentation." *Id.* He recommended MRI ("magnetic resonance imaging") tests of Claimant's thoracic and lumbar spine, which later revealed a normal spine. Cx 1 at 14-15. Claimant was started on intravenous Solu-Medrol.[3] Cx 1 at 18.

Claimant was later examined by Dr. Richard Taraska, who noted that Claimant had "a sensory deficit throughout the left upper extremity and left lower extremity when sharp and dull sensation was tested," and "deep tendon reflexes revealed hypertonicity of the left lower extremity." Cx 1 at 4. Claimant was diagnosed with an acute left sided neurological deficit status post trauma, and admitted into the general hospital. *Id.*

On April 12, 2000, Dr. Edmund S. Evangelista conducted a rehabilitation consultation with Claimant. Cx 1 at 22. Claimant reported pain in his middle and lower back, numbness in the lower extremity which was worse than the left upper extremity, and paresthesias on the sole of his left foot and in the left hand. Cx 1 at 20. Dr. Evangelista assessed Claimant with "a sensory deficit in the left upper and lower extremities as well as weakness which could not be adequately assessed at time secondary to the patient's pain." Cx 1 at 21. He noted Claimant may have suffered a lower motor neuron injury "such as a nerve root impingement with radiculopathy," and to rule this out, Dr. Evangelista recommended an MRI test of the lumbosacral spine. Cx 1 at 21-22.

On April 15, 2000, Claimant was discharged with the diagnosis of central nervous system injury status post hit by a truck. Cx 1 at 23. Claimant was noted to have "markedly improved" and required no medications, but was discharged with a walker. *Id.*; Cx 3 at 27. Claimant subsequently underwent physical therapy. Cx 3 at 27.

On May 18, 2000, Claimant was examined by Dr. David F. Morgan, board certified in neurological surgery since 1985. Cx 3 at 26-28; Ex 18. Claimant reported continuing weakness in both his left lower and left upper extremities, and complained of pain in his left shoulder and at the base of the neck. Cx 3 at 27. Dr. Morgan's physical examination revealed that Claimant had diminished sensation in the left upper extremity in a glove like distribution and in the left lower extremity in a stocking like distribution. Cx 3 at 28. His impression of Claimant was that Claimant had "significant traumatic injury involving his shoulder, his neck, questionably his spinal cord, also involving his left upper extremity and left lower extremity." *Id.* Dr. Morgan prescribed Claimant the pain reliever Vicodin, and also recommended an MRI of Claimant's lumbar spine. *Id.*

On June 14, 2000, Claimant was examined by Dr. James T. London, board certified in orthopedic surgery since 1975. Ex 6 at 9-18; Ex 16. Claimant's complaints included constant pain over the back of his neck that radiated down into his left shoulder and arm, constant

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[3]Solu-Medrol is an anti-inflammatory steroid. PHYSICIANS' DESK REFERENCE (56th ed. 2002).

weakness in his left upper extremity as well as left lower extremity, and constant low back pain radiating into the left buttock and leg. Ex 6 at 9-10. Dr. London performed a physical examination of Claimant's cervical spine, left upper extremity and thoracolumbar spine. Ex 6 at 16-17. In his report, Dr. London stated that the objective findings did not support Claimant's subjective complaints. Ex 6 at 18. These objective findings included:

> stocking/glove-like nondermatomal sensory loss in the left lower and left upper extremities; give-way weakness on resisted muscle testing in the left upper and left lower extremities despite normal arm, forearm, thigh and calf circumferences on the left side; variable grip loss in the left hand; and tenderness with superficial palpation of the skin causing exaggerated withdrawal.

Id. Dr. London noted that it would be "most unusual" for an individual with any injury to the cervical spinal cord to have a loss of muscle power and sensation on the same side of his body with no findings on the opposite side. *Id.* Dr. London diagnosed Claimant with a closed head injury, a cervical sprain, left shoulder sprain, and a thoracolumbar sprain as a result of the April 11, 2000 injury. *Id.* He opined that Claimant needed further medical treatment, and recommended that he undergo electrodiagnostic testing as well as a neurologic consultation. *Id.*

Claimant underwent an MRI of his lumbar spine on June 19, 2000. Cx 2 at 24. The MRI revealed a "Mild grade II bulging slightly to the right of midline at L5-S1 with disc desiccation at L5-S1 intervertebral disc." *Id.* Claimant's cervical spine MRI revealed a "probable extruded disc fragment encroaching on the left lateral recess at C5-C6," and a "minimal grade II bulging slightly to the right of midline at C5-C6 with minimal encroachment on the left lateral recess." Cx 2 at 25.

On July 3, 2000, Dr. Majid Molaie performed a neurologic consultation with Claimant. Ex 8 at 43-45. Claimant's chief complaint was pain in his shoulder, left arm and leg, as well as pain in his low back region on the left side. Ex 8 at 43. Claimant also complained of weakness of his entire left arm and left leg. *Id.* Dr. Molaie performed an electromyogram[4] ("EMG") as well as a nerve conduction study of Claimant's left upper and lower extremities, and found the results to indicate "no evidence of cervical or lumbosacral active radiculopathy nor is there any evidence of peripheral nerve entrapment." Ex 8 at 44-45. Dr. Molaie concluded that there was no abnormal neurological finding to account for Claimant's reported symptoms. *Id.*

In his supplemental report dated July 24, 2000, Dr. London reviewed Dr. Molaie's findings, the June 19, 2000 MRI of Claimant's cervical spine, and one surveillance tape of Claimant taken on July 7-8, 2000. Ex 6 at 19. Based on this and his recent evaluation of Claimant, Dr. London opined that Claimant's condition should be permanent and stationary, able to perform his usual and customary work, and that he had no permanent disability related to the April 11, 2000 incident. Ex 6 at 20-21.

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[4]An EMG records the electrical activity of a muscle as measured by an electromyograph.

On July 27, 2000, Claimant again saw Dr. Morgan. Cx 3 at 29. Dr. Morgan reviewed Claimant's cervical spine MRI and noted that while there was disc protrusion at the C5-6 level, he did not believe it was clinically significant. *Id.* Dr. Morgan stated that neurosurgery was not warranted, and that Claimant could return to work. *Id.* He noted that Claimant "seems satisfied with this." *Id.*

Dr. London examined Claimant again on September 22, 2000. Ex 6 at 22 -24. Dr. London noted that Claimant attempted to work in July 2000, but stopped only after about half an hour because of pain in his low back and a shocking sensation in the left leg. *Id.* At the examination, Claimant reported occasional low back pain without radiating into his lower extremities, but occasional numbness in his left leg radiating down into his left foot, and rare stiffness in his neck. Ex 6 at 22-23. Dr. London noted that there was no atrophy or weakness in both the upper and lower extremities. Ex 6 at 23-24. Dr. London reiterated his assessment that Claimant had sustained a closed head injury, a cervical strain and sprain, a left shoulder sprain, and a thoracolumbar strain and sprain as a result of the industrial injury. Ex 6 at 24. He opined that Claimant was able to work, but that Claimant's condition should become permanent and stationary in six to eight weeks. *Id.* Dr. London recommended that Claimant continue his home exercises, but no additional medical treatment was indicated. *Id.*

On September 28, 2000, Claimant underwent an initial evaluation and orthopedic consultation with Dr. John J. O'Hara. Cx 4 at 30. Dr. O'Hara is board certified in orthopedic surgery since 1968, and in 1989 obtained a certificate of added qualifications in surgery of the hand. Cx 5. Although Claimant reported to Dr. London that he sought the services of Dr. O'Hara "on the advice of his attorney," according to Claimant's testimony, he went to Dr. O'Hara because he was dissatisfied with his present medical care and Claimant also had "a lot of confidence" in Dr. O'Hara since he had previously performed surgery on Claimant's hand. Tr 51-52. Dr. O'Hara noted that Claimant had not worked since his industrial injury of April 11, 2000. Cx 4 at 31. Claimant complained of headaches in the left side of his head, a pulling sensation and numbness and tingling in the left leg, and soreness in his low back. *Id.* Dr. O'Hara reviewed Claimant's medical records, as well as the July 7-8, 2000 surveillance tape. Cx 4 at 35-37. Dr. O'Hara noted that Claimant had received the benefit of "excellent consultation and imaging studies." Cx 4 at 38. His physical examination of Claimant revealed no atrophy in the upper or lower extremities, and no obvious sensory deficit. Cx 4 at 37-38. Dr. O'Hara concluded that Claimant had received a sprain and contusing injuries to the cervical spine, thoracolumbar spine, left leg and left shoulder as a result of the April 11, 2000 incident. Cx 4 at 38. Dr. O'Hara stated that Claimant's condition was not yet permanent and stationary, though he had "recovered to the point where he can return to his usual duties with some care in selection of the jobs that he takes," and recommended that Claimant avoid heavy lifting and overhead work for the next several weeks. *Id.* Lastly, Dr. O'Hara recommended ongoing general conditioning or work hardening. *Id.*

The following day, on September 29, 2000, Claimant returned to work. Tr 54. According to Dr. O'Hara's report dated October 19, 2000, Claimant did not take all categories of work

and only worked for four hours in a day. Cx 4 at 40. Dr. O'Hara performed a cursory neurological examination and found Claimant normal, but "strongly recommended" that Claimant return to Dr. Molaie for treatment regarding his reported headaches. *Id.*

Dr. O'Hara examined Claimant again on November 2, 2000, and concluded that the findings were basically unchanged since the previous exam on October 19, 2000. Cx 4 at 42. He noted that Claimant "should be approaching a permanent and stationary status" within approximately four to six months. *Id.*

On November 10, 2000, Dr. London examined Claimant and in his report dated November 14, 2000, noted that Claimant had been working light duty two to three days a week. Ex 6 at 25. Claimant further told Dr. London that his neck, upper back, left shoulder and left upper extremity had improved, but his lower back and left lower extremity pain remained the same. *Id.* Dr. London opined that Claimant's condition was permanent and stationary, with no factors of permanent disability, and concluded that Claimant was capable of performing his usual and customary work without restrictions. Ex 6 at 29. He noted that Claimant did not need further orthopedic treatment, but recommended that Claimant seek neurologic evaluation because of Claimant's reported visual problems. *Id.*

Claimant underwent a neurologic evaluation on December 11, 2000, with Dr. Ronald D. Farran, board certified in psychology and neurology since 1974. Ex 7 at 30-34; Ex 17. Claimant reported continued low back pain, headaches, blurry vision and forgetfulness. Ex 7 at 32. Dr. Farran concluded, on the basis of his clinical examination, review of medical records, as well as the July 7-8, 2000 surveillance tape, that Claimant had reached maximum medical improvement, and no work restrictions were indicated. Ex 7 at 34-42.

In his brief report dated December 20, 2000, Dr. O'Hara noted that Claimant continued to have pain in his left low back, left foot, leg and hand. Cx 4 at 43. He concluded that Claimant should not try to work more than three days a week, and that his medical status was "far from permanent and stationary" after his industrial injury. Cx 4 at 44.

Dr. O'Hara evaluated Claimant again and issued a permanent and stationary report on April 4, 2001. Cx 4 at 45. Claimant reported pain in his cervical spine, left lower extremity and low back. Cx 4 at 47. After examining Claimant and reviewing his medical records, Dr. O'Hara concluded that Claimant had residual subjective symptomatology reasonably associated with his neck, left shoulder, and back injuries resulting from the April 11, 2000 industrial incident. Cx 4 at 49. He also rated Claimant's disability according to the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, finding Claimant to be in Category II with regard to both his cervical and lumbar spine. Cx 4 at 49. According to Dr. O'Hara, Claimant suffered an eleven percent whole person impairment. Cx 4 at 50. Dr. O'Hara based his conclusions on the "cervical and lumbar spine abnormalities in the clinical findings," as well as Claimant's subjective symptoms. Cx 4 at 49. Dr. O'Hara did not indicate any work restrictions for Claimant, and opined that Claimant was not medically eligible for vocational rehabilitation. Cx 4 at 50. He also

concluded that Claimant demonstrated areas of lasting injury in the cervical and lumbar spine, both of which "while possibly partially progressive and degenerative in nature, were certainly aggravated by the injury of April 11, 2000 and therefore have a strong component of causation by employment." Cx 4 at 51. As to Claimant's future medical treatment, Dr. O'Hara indicated that Claimant would benefit from orthopedic evaluations, and he proposed surgery if Claimant's symptoms persisted or worsened. *Id.*

Two months later, on June 18, 2001, Dr. London examined Claimant and reviewed Claimant's recent medical history including Dr. O'Hara's April 2001 report. Ex 6 at 29a-29f. Claimant reported intermittent low back pain, made worse with activities such as bending, lifting, and prolonged sitting. Ex 6 at 29a. Claimant also reported that this pain rarely radiated down his left leg, and that he experienced intermittent spasms in his lower back that were worse after work. Ex 6 at 29b. Dr. London opined that Claimant had recovered from the April 2000 incident, was able to return to his work without any restrictions, and did not require any further medical treatment. Ex 6 at 29e.

On July 5, 2001, Dr. O'Hara issued a supplemental report to his April 4, 2001 report. Cx 8 at 69-71. On the basis of his medical findings in the latter report, Dr. O'Hara concluded that "there is reasonable medical basis for the claimant to limit his work activity to the type of activity that he can perform without danger or without pain." Cx 8 at 70. Dr. O'Hara reported that Claimant "basically refused being placed on the casualty board as I suggested to him and thought that he could perform work activity on his customary B UTR board, which he stated he could perform somewhat comfortably and safely." *Id.* Dr. O'Hara also declared that under the Workers' Compensation Appeals Board ("WCAB"), Claimant was medically eligible for vocational rehabilitation. Cx 8 at 71.

Dr. O'Hara re-evaluated Claimant on May 28, 2002, noting that Claimant had been working occasionally and finding work that would comport "with restrictions placed on him with regard to overhead work and heavy lifting." Cx 10 at 75. Claimant reported intermittent low back pain, and intermittent parasthesis of a burning nature along his left thigh. *Id.* Dr. O'Hara concluded that the findings on Claimant's physical examination were unchanged from April 4, 2001, and that Claimant's condition was related to his industrial injury which resulted in a "transient paralysis of his left upper extremity," and was also related to "disc protrusion and/or herniation in the cervical and lumbar spine." Cx 10 at 76.

Dr. London also performed an examination of Claimant on May 24, 2002, and noted that since June 18, 2001, Claimant had not had any additional medical treatment and had been working full duty as a longshoreman doing swing jobs. Ex 6 at 29g. Claimant reported occasional low back spasms, numbness in his left hip radiating down his left leg, and pain and swelling over his left knee. *Id.* Claimant further reported that these symptoms were worse with increased activity, but that there were no symptoms referable to his neck or left shoulder. Ex 6 at 29g-h. Dr. London concluded that Claimant had recovered, his condition was permanent and stationary, and that no further medical treatment, diagnostic testing, medication or surgery was indicated. Ex 6

at 29j. Dr. London also noted that Claimant had pain and swelling in his left knee, and that his physical examination was consistent with a meniscal cyst, most likely secondary to a degenerative meniscal tear, but in his opinion Claimant did not sustain an injury to his left knee on April 11, 2000. *Id.*

Prior to the April 11, 2000 incident, Claimant suffered an injury to his back, occurring in December 1998. Ex 14. He was diagnosed by a chiropractor with a cervical spine sprain/strain. Ex 14 at 161. Claimant also testified that he suffered an industrial injury to his right hand prior to April 11, 2000 for which he underwent hand surgery with Dr. O'Hara to restore nerves in that hand. Tr 61.

Subsequent to the April 11 injury, Claimant underwent an appendectomy in April 28, 2001, and was off work from April 28 to May 20, 2001. Tr 108. Claimant also fractured or twisted his right ankle while at work with Marine Terminals on July 12, 2002, and did not work from July 13 through September 10, 2002. Tr 62-63, 108; Ex 20. According to Claimant's injury history report, Claimant also suffered a "Sprain/Strain/Spasm Nervous System," occurring on September 18, 2002 while at work with Stevedoring Services of America, but at the hearing Claimant was unable to remember that injury. Tr 109; Ex 20 at 240.

Claimant returned to work on September 29, 2000, checked in on the BUTR board and performed work as a lash aloft swing. Tr 54; 100. At the hearing, Claimant testified that since returning to work he has taken "drops" that were "already done" and "gear jobs moving boxes," but denied taking any lashback jobs. Tr 55; 100. Claimant explained that although his work records indicate "lasher" for some days, either the records were wrong, described the wrong work, or he had "reaped out." Tr 101, 120. He stated that he could not lift bars as required in the lashback job, and if Claimant did, his ankle and lower back would start spasming. Tr 56. Claimant testified that the low back pain and the pain radiating down his left leg, made worse with lifting 25-30 pounds and repeatedly bending, kept him from performing his normal job duties. Tr 57-58. According to Claimant, Claimant's brother, also a longshoreman, would help cover Claimant for the job duties he was unable to do himself, such as signaling, which involved standing for at least an hour and a half. Tr 63-64, 75.

Two surveillance tapes of Claimant's recorded activities were introduced at the hearing. The first tape, taken on July 7-8, 2000, is approximately 32 minutes in duration. Ex 15. The tape reveals Claimant on July 7, 2000 walking into a Home Depot store, exiting the store with a shopping cart, and pulling two small boxes from the cart. The boxes, as Claimant testified, consisted of light transformers and each box weighed about ten pounds. Claimant proceeded to return the cart into the store, and after a brief moment, Claimant is seen running quickly from the store with a man chasing him. Claimant runs through the parking lot and onto the adjacent sidewalk. That evening Claimant is seen waiting briefly in a car for the passenger to return from a mini-mart. Claimant testified at the hearing that while inside the Home Depot, a man grabbed his arm, told him he was stealing, and called another man for assistance. At that point they informed Claimant that they were security guards, but when the men began to grab Claimant, Claimant ran

out of the store. Tr 68-69. Claimant ran at full speed for approximately 30 feet, and at trial denied that he had stolen anything. Tr 70. Dr. London, in his deposition testimony, noted that Claimant ran "full tilt" without any pain-avoidance behavior.

The surveillance of Claimant taken the following day reveals Claimant moving boxes from his house into his truck. Ex 15. At approximately 1:00 p.m., Claimant walks outside his house, carrying in each hand a small box, which he loads onto his truck. Claimant returns to his house, and proceeds to place another loaded box/crate onto his truck. In total, Claimant moves from his house to his car a boombox, two boxes/crates separately, a few clothes on hangers (which is done three times), six boxes/crates separately, a floor fan, two boxes/crates stacked on top of each other, and lastly another box/crate. The activity ends at approximately 1:42 p.m. Claimant testified that the boxes/crates he moved weighed at most fifteen pounds, and consisted of items such as papers and clothes. Tr 72-73. The weight of lashing gear, Claimant stated, was about 60 pounds. Tr 77. He testified that at the time the tape was taken, he could not have returned to his job because he wouldn't be able to stand at work all day, or repeatedly lift cones. Tr 94.

Another surveillance tape, recorded on July 16, 2001, reveals Claimant buying an ice cream at approximately 11:44 a.m., and washing his truck at approximately 12:32 p.m. Ex 15. Claimant rinses and scrubs his truck and bends at his knees to scrub the tires. The car wash activities cease at about 1:04 p.m.

According to Claimant's work history and records, between September 29 and through December 2000, Claimant worked 398 hours and had gross wages of $11,660.23. Ex 12 at 68. In 2001, Claimant worked 674 hours as a dockman, holdman and lasher from January through June and earned $25,520.99. Ex 12 at 70, 89. In 2002, Claimant worked 1,079 total hours as a swingman, lasher, holdman and gearman, and had gross earnings of $47,905.40. Cx 9 at 73; Ex 20. From January 2003 to March 21, 2003, Claimant worked 494.50 hours, as a dockman, holdman, lasher and foreman, and earned $23,233.69. Cx 9 at 74; Ex 20.

Employer paid Claimant temporary total disability from March 12, 2000 through July 24, 2000 at the compensation rate of $858.61, amounting to $12,756.37 total. Tr 8.

II. Discussion

Stipulations

At the hearing, the parties stipulated that Claimant sustained an injury on April 11, 2000, while employed by Maersk Pacific, Ltd. as a swingman; an employer-employee relationship existed; notice was timely given and the claim timely filed; the claim was timely controverted; the average weekly wage on the date of injury was $1,287.92; and that Claimant has received reasonable and necessary medical care and treatment. Tr 8-9. The parties do not dispute jurisdiction under the Act. Tr 8. I find that the foregoing stipulations are supported by the evidence, and therefore accept them.

The primary dispute between the parties is to what extent, if any, Claimant's wage-earning capacity has been diminished as a result of the April 11, 2000 incident. The parties also disagree as to the precise industrial injuries sustained by Claimant and the specific date upon which Claimant reached maximum medical improvement. Claimant also asserts entitlement to reimbursement for medical costs, and lastly, seeks attorney's fees and costs.

In arriving at a decision, the administrative law judge is entitled to determine the credibility of witnesses, to weigh the evidence, and to draw his own inferences from it; furthermore, the administrative law judge is not bound to accept the opinion or theory of any particular medical expert. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 (1985).

A. Section 20 Presumption

Pursuant to Section 20 of the Act, a claimant's condition is presumed to be causally related to the claimant's employment in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir. 1998). To invoke the presumption, the "claimant need only show that [he] sustained physical harm and that conditions existed at work which could have caused the harm." *Id.* (quoting *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986)). Once invoked, the burden of proof shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991).

In the instant case, the parties agree and I find that as a result of the April 11, 2000 incident, Claimant sustained injuries to his head, neck, left shoulder and thoracolumbar spine. Claimant further asserts, however, that he sustained an injury to his low back with radiating pain into his left leg.[5] I find that Claimant has established a *prima facie* case of an injury to his low back resulting from his industrial accident. As the medical reports demonstrate, Claimant consistently reported pain in the lumbosacral area, extending into his left leg. He also reported weakness in his left lower extremity, and used a cane for ambulation because of such weakness in his left leg. The day following the industrial incident, Claimant was assessed with left hemi-hypesthesia[6] and weakness, and sensory deficit in the left upper and left lower extremities. Dr. Morgan initially opined that Claimant had a significant traumatic injury to the shoulder, neck and possibly the spinal cord involving left upper and lower extremities. Dr. O'Hara specifically opined

[5]Claimant initially sought compensation for injuries to his head, neck, left shoulder, left upper extremity, left hip, left lower extremity and back. At the hearing, counsel for Claimant indicated and Claimant agreed that the residuals of Claimant's injury are confined to the low back with pain radiating to the left leg. Tr 14.

[6]Dr. London stated that "hemi-hypesthesia" is the decreased sensation on the left side of the body.

that the April 11, 2000 incident aggravated Claimant's back condition, including the disc space bulging as revealed by an MRI, which in turn could cause Claimant's clinical symptoms of radiculopathy. Based on the foregoing, I find that Claimant has established that he sustained an injury to his low back and that the incident on April 11, 2000, could have caused the injury. *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). As a result, I find that Claimant has established a compensable claim under the Act.

Once the *prima facie* case is met, it is the employer's burden to rebut the presumption with substantial countervailing evidence that the claimant's condition was not caused or aggravated by his employment. *Cairns v. Matson Terminals, Inc.,* 21 BRBS 252 (1988). Such evidence includes a physician's unequivocal statement, to a reasonable degree of medical certainty, that the claimant's injury is not related to his employment. *O'Kelley v. Dep't of Army/NAF,* 34 BRBS 39, 41-42 (2000). Here, Employer offers the opinion of Dr. London, who opined, and in his deposition testified, that Claimant's subjective complaints of pain and/or numbness were not substantiated by the objective evidence. This opinion was formed in the context of whether Claimant could return to work, however, and not as to whether the April 11, 2000 incident could have initially resulted in an injury to Claimant's low back or could have caused or aggravated Claimant's back condition. I find that this evidence is not "specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Parsons Corp. v. Director, OWCP,* 619 F.2d 38, 41 (9th Cir. 1980). Accordingly, I find that Claimant's low back injury is entitled to a presumption of compensability.

B. Nature and Extent of Disability

A disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." 33 U.S.C. § 902(10). Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by the claimant. 33 U.S.C. § 908(c)(21); *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 59 (1985). When evaluating a disability, the administrative law judge will consider the claimant's age, education, and employment history, as well as the availability of appropriate employment. *American Mutual Insurance Co. v. Jones,* 426 F.2d 1263, 1265 (D.C. Cir. 1970).

Nature of Disability

A disability is permanent if the claimant has any residual impairment after reaching maximum medical improvement or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedores Corp.,* 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); *Trask,* 17 BRBS at 60. The parties have stipulated that Claimant's condition is permanent, and because there exists substantial evidence for this stipulation, I accept it.

While the parties agree that Claimant's condition is permanent, they disagree as to the date on which Claimant reached maximum medical improvement. Claimant argues that he reached maximum medical improvement on April 4, 2001, whereas Employer contends that Claimant's condition had reached a permanent and stationary status no later than November 10, 2000.

Generally, in evaluating this issue, the opinion of the claimant's treating physician is to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir.), *cert. denied sub nom. Sea-Land Service, Inc. v. Director, OWCP*, 528 U.S. 809 (1999); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1043 (2nd Cir. 1997). With respect to Claimant's orthopedic condition, I find that Dr. London's opinion is more persuasive as to the date of maximum medical improvement than Dr. O'Hara's opinion. Claimant saw both Dr. London and Dr. O'Hara for his April 11, 2000 injuries equally; both physicians, therefore, had an equal opportunity to "know and observe" Claimant. Dr. London also examined Claimant closer to the date of Claimant's injury, whereas Claimant saw Dr. O'Hara over one half of a year following the industrial accident. Furthermore, Dr. London's report is well supported and consistent with the record, rendering his opinion of greater weight than Dr. O'Hara's opinion. Based on the foregoing, I find that Claimant reached maximum medical improvement as to his orthopedic condition on November 14, 2000, the date of Dr. London's report.

The remaining issue then is that of Claimant's neurological condition. Employer asserts that Claimant's condition was permanent and stationary as of his July 27, 2000 examination with Dr. Morgan. The record indicates, however, that after his November 2000 examination, Dr. London referred Claimant for a neurologic evaluation with Dr. Farran because of Claimant's reported vision problems, forgetfulness, and headaches. Dr. Farran evaluated Claimant and comprehensively reviewed his medical history, and in his detailed report dated December 15, 2000, found that Claimant had reached maximum medical improvement with respect to his neurological condition. Dr. Morgan's July 27, 2000 report, on the other hand, consists of only one paragraph, and merely indicates that "neurosurgery is not in the offing for the patient at this time." I find Dr. Farran's specificity and thoroughness in his report more probative as to this issue, and accordingly find that Claimant reached maximum medical improvement as to his neurologic condition on December 15, 2000.

Based on the foregoing, I find and conclude that Claimant reached maximum medical improvement as to his entire condition on December 15, 2000.

Extent of Disability

The principal dispute between the parties concerns the extent of Claimant's disability. Disability under the Act is, as the Supreme Court has stated, "a measure of earning capacity lost as a result of work-related injury." *Metropolitan Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 121, 127 (1997). For non-scheduled permanent partial disabilities, Section 8(c)(21) provides that

an award of compensation shall be 66 2/3 per centum of the difference between the claimant's pre-injury average weekly wage and his post-injury wage earning capacity. 33 U.S.C. §908(c)(21). Wage-earning capacity may be ascertained according to claimant's actual earnings, if they "fairly and reasonably represent his wage-earning capacity," and if they do not, then with "due regard to the nature of [claimant's] injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." 33 U.S.C. §908(h).

Claimant contends that he is physically restricted from performing certain job duties as a result of his industrial injuries, and this is reflected in his current wage earning capacity of $1,091.89, or a $196.03 decrease of his pre-injury average weekly wage. Even assuming the certainty of this figure, I find the medical evidence and Claimant's own testimony casts doubt as to whether his actual earnings accurately reflect his residual earning capacity.[7]

First, Drs. London, Morgan and Farran each opined that Claimant could return to his usual and customary pre-injury job duties without restrictions. I find the physicians' opinions and conclusions persuasive, as they are well-documented, supported, and consistent with the record.

Dr. O'Hara's opinions, on the other hand, are problematic in their inconsistencies and variations. His numerous reports fail to establish with any specificity or support whether and to what extent Claimant's ability to work is limited. For instance, in his September 2000 report, Dr. O'Hara concluded that Claimant could return to work but restricted Claimant from "heavy lifting" and "overhead work" for the next several weeks. Ultimately, in his April 2001 report, Dr. O'Hara opined that such work restrictions were no longer indicated, but in his May 2002 supplemental report, referring to the April 2001 report, concludes that "the patient's work restrictions remain the same," but notes that the overhead and heavy lifting restrictions are still effective, if only by Claimant's own adherence to, rather than Dr. O'Hara's imposition of, these restrictions. Moreover, Dr. O'Hara did not restrict Claimant as to any amount of hours, though he reported that Claimant had restricted himself to working about three days a week. In the December 2000 report, however, Dr. O'Hara concluded that Claimant "is working to his maximum" and that he "should not try to work any more than he has, i.e., three days per week." Cx 4 at 44.

In the April 2001 permanent and stationary report, Dr. O'Hara concluded, under the heading "Work Restrictions," that claimant had demonstrated his ability to continue to work and "therefore avocation of his duties or placement on the casualty board is not indicated." Ex 4 at 50. Then, in a supplemental report to the April 2001 report, Dr. O'Hara stated that Claimant

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[7]Claimant's pre-hearing statement indicates a figure of $1,091.89, but at the hearing counsel for Claimant indicated the figure of $1,072.92. Tr 17. The latter figure apparently is also based on incomplete wage hour and earnings records for the year 2001, as Claimant's records show Claimant worked only 529 hours through April and earned $20,157.46, whereas Employer's records show Claimant worked 674 hours through June and earned $25,520.99.

"refused being placed on the casualty board as I suggested to him and thought that he could perform work activity on his customary B UTR board, which he stated he could perform somewhat comfortably and safely." Cx 8 at 70. Dr. O'Hara continues in parentheses: "(In the absence of his needs as a longshoreman I would have placed work restrictions on his work activity in terms of no heavy lifting, no climbing, no overhead lifting, no power grasping, no standing or walking for more than one hour without a five minute recovery time and no sitting for more than fifteen minutes without a five minute recovery time.)" *Id.* I am unable to determine whether Claimant's "needs as a longshoreman" also included his medical needs, but irrespective of this Dr. O'Hara in the same report concluded that there was a reasonable medical basis for Claimant to limit his work activity "to the type of activity that he can perform without danger or without pain." Cx 8 at 70. I find this lack of specificity unhelpful in determining Claimant's ability to return to his regular work, and accordingly find Dr. O'Hara's opinion of diminished probative value.

Because of the inconsistencies and ambiguity in Dr. O'Hara's reports I find that his opinion is entitled to little weight. Consequently, on the basis of the opinions of Drs. London, Morgan and Farran, I find that Claimant was and is able to return to his regular, full duty employment.

Despite the lack of objective medical evidence that supports Claimant's contention, Claimant alleges that he cannot work certain jobs because of his subjective complaints of pain in his back and leg. While it is possible to base a finding of disability on a claimant's credible complaints of pain alone, *see Ballard v. Newport News Shipbuilding and Dry Dock Co.*, 8 BRBS 656 (1978), in the instant case Claimant's subjective reporting of pain is contradicted by his own testimony at trial, rendering his reports less persuasive. Claimant testified that he could not perform the same kind of work that he did before the injury because of pain while bending—which on cross-examination was qualified as "rapid" bending—and experienced pain while repetitively lifting heavy objects. On cross-examination Claimant agreed, however, that post-injury, he was in fact performing the same job duties that he was doing before the industrial injury of April 2000.

Claimant also testified that since returning to work he has not taken any lasher work, though his work records indicate that he has taken such jobs. Claimant explained that though the work records might identify his work as "lasher," in fact he performed a less arduous job of "lash aloft swing," or otherwise he would "reap out" the lasher job. Claimant agreed though that if he reaped out, he would not receive pay, but this is contradicted by the wage records indicating that he was in fact paid for lasher work. Claimant also testified that he had done holdman work, which by his own admission is more physically demanding than working on the dock, including unlatching twist locks.

Furthermore, Claimant's work records show that he has in fact taken time off, but as Claimant's own testimony suggests, some of the time off was not due to pain because of the April 2000 injury. Claimant indicated that he did not work a number of weeks because of the pain due

to his ankle injury in 2001. The evidence also fails to indicate whether Claimant sought any further medical treatment for his knee and back pain, including during the times in which he was not working because of it.

The inconsistencies in Claimant's testimony, coupled with his actual conduct and work history, diminishes his credibility concerning the level and effect of his pain on his work. Accordingly, I assign Claimant's testimony little weight on this point. In addition, Claimant candidly stated at trial that he can take whatever jobs he wants to take, because he is a Class A longshoreman. There is no issue, therefore, as to the availability of longshore work for Claimant.

While undoubtedly Claimant may experience pain associated with his condition, I find the evidence insufficient to establish that such pain is so debilitating so as to prevent Claimant from performing at a level where he could match his pre-injury earning capacity. I find and conclude that Claimant suffers no loss in wage-earning capacity and is therefore not entitled to an award for permanent partial disability.

Temporary Disability

As to the periods of temporary disability, I find that based on the record as a whole, Claimant was temporarily totally disabled from the time of his injury on April 11, 2000, through September 28, 2000. Thereafter, Claimant was temporarily partially disabled until he was released for both his orthopedic and neurologic condition and able to return to regular duty work on December 15, 2000.

III. Entitlement to Medical Expenses and Costs

Employer does not dispute its liability for continuing medical care related to Claimant's industrial injuries to the head, neck, left shoulder and thoracolumbar spine. Employer disputes its liability, however, for medical care rendered on behalf of Claimant by Dr. O'Hara, amounting to $819.90, itemized at Cx 6. Under Section 7(a), reasonable and necessary medical expenses incurred since the industrial injury may be assessed against the employer. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). Section 7 does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988).

Employer denies Claimant's entitlement to medical treatment subsequent to July 27, 2000, when, as Employer alleges, Claimant's condition had resolved. Claimant sought treatment with Dr. O'Hara beginning in September 2000, after Dr. London concluded that Claimant's orthopedic, not neurologic, condition had fully resolved. I find that Claimant was justified in seeking

treatment with another physician considering Claimant reported continuing pain, and is therefore entitled to reimbursement for necessary treatment subsequently procured on his own. *See Matthews v. Jeffboat, Inc.*, 18 BRBS 185, 189 (1986). As a result, Claimant is entitled to reimbursement for the necessary and reasonable treatment rendered by Dr. O'Hara in the amount of $819.90.

ORDER

It is ordered that:

1. Employer shall pay Claimant temporary total disability compensation based on the average weekly wage of $1,287.92, from April 11, 2000 through September 28, 2000.

2. Employer shall pay Claimant temporary partial disability compensation based on the average weekly wage of $1,287.92, from September 29, 2000 through December 15, 2000.

3. Employer shall reimburse Claimant $819.90 for his unpaid medical expenses as a result of the April 11, 2000 work-related injury pursuant to Section 7.

4. Employer remains liable for all reasonable medical costs necessitated in the future as a result of the April 11, 2000 work-related injury pursuant to Section 7.

5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

6. All calculations necessary for payment of this award shall be made by the District Director.

7. (a) Claimant's counsel shall file a petition for the allowance of fees and costs within 10 days after the filing of the within Decision and Order. Such submission shall be on a line item basis and shall separately itemize the time billed for each service rendered. Each such item shall be separately numbered.

   (b) All objections to Claimant's counsel's said petition shall be on a line item basis using Claimant's counsel's numbering system, and shall be filed by Employer within 5 days after receipt thereof. Any item not objected to in such manner and within such time will be deemed acquiesced in by Employer.

   (c) Within 5 days after receipt of any such objection(s), Claimant's counsel may file a response thereto. Such submission shall be on a line item basis following the same numbering system. Any objection not responded to in such manner and within such time will be deemed acquiesced in by Claimant's counsel.

(d) No further submission will be considered unless expressly authorized by the undersigned.

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DONALD B. JARVIS
Administrative Law Judge